Akitek Bersatu v Sempurna Cekap Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO S3-22-343 OF 1996

MOHD HISHAMUDIN J

26 AUGUST 2004

Civil Procedure — Action — Parties — Whether plaintiff merely a business name — Whether seized with legal personality to maintain cause of action — Whether action to be struck off — Rules of the High Court 1980 O 18 r 19

The defendant, after entering an unconditional appearance, had applied to strike out the plaintiff's cause of action on the ground that the plaintiff was not an entity capable of suing in law. It was submitted that the plaintiff was merely a business name and did not have a legal personality to maintain a cause of action. The Senior Assistant Registrar dismissed the defendant's application. Hence, this appeal.

Held, allowing the appeal with costs:

(1) The plaintiff in the present action, by using the title 'Akitek Bersatu' in the title of the writ and statement of claim, has not satisfied the court that he/it has a legal personality to sue. As such, no reasonable cause of action exists (see para 27).

(2) A defendant in an action is not precluded from making an O 18 r 19 application just because he has filed an unconditional appearance (see para 28).

[**Bahasa Malaysia summary**

Defendan, setelah memasuki kehadiran tak bersyarat, telah memohon untuk membatalkan kausa tindakan plaintif atas alasan ia bukannya satu entiti yang boleh mendakwa di bawah undang-undang. Telah diutarakan bahawa plaintif hanya satu nama perniagaan dan tidak mempunyai personaliti undang-undang untuk memulakan satu kausa tindakan. Timbalan kanan pendaftar telah menolak permohonan defendan. Maka, rayuan ini.

Diputuskan, membenarkan rayuan dengan kos:

(1) Plaintif dalam tindakan semasa, dengan menggunakan nama 'Akitek Bersatu' di permulaan writ dan kenyataan tuntutan, tidak memenuhi kehendak mahkamah bahawa ia mempunyai personaliti undang-undang untuk memulakan tindakan. Oleh itu, satu kausa tindakan tidak wujud (lihat perenggan 27).

(2) Defendan tidak dihalang daripada membuat satu permohonan di bawah A 18 k 19 hanya kerana ia telah memfailkan kehadiran tak bersyarat (lihat perenggan 28).

Notes

For cases on action by parties, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 147–149

Cases referred to

Alor Janggus Soon Seng Trading Sdn Bhd v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241 (distd)
Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme and another action [1987] 2 MLJ 633 (refd)
Chan Min Swee v Melawangi Sdn Bhd [2000] 7 CLJ 1 (refd)
Fu Yen Development Sdn Bhd v Shelly Yap Leong & Co [2001] 3 CLJ 946 (refd)
Jamir Hassan v Kong Min [1992] 2 MLJ 46 (refd)
Mason and Son v Mogridge (1892) 8 TLR 805 (refd)
Pet Far Eastern (M) Sdn Bhd v Tay Young Huat [1999] 2 CLJ 886 (refd)
Tengku Jaafar v Karpal Singh [1993] 4 CLJ 183 (refd)
TV Carrupaiya v MBf Property Services Sdn Bhd & Anor [2000] 4 CLJ 116 (refd)
Wee Thiang Kheng & Ors v Ngu Nii Soon & Ors [1989] 1 MLJ 252 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19, O 18 r 19(1)(a), O 77 r 1, 9

Faizalludin bin Mohamad Yusuf (Ariffin Raj De Silva) for the plaintiff
M Mathew (T Gunaseelan & Associates) for the defendant

Mohd Hishamudin J:

[1] This is an appeal by the defendant against the decision of the learned Senior Assistant Registrar who had dismissed the defendant's application under O 18 r 19(1)(a) of the Rules of the High Court 1980 ('the RHC') to strike out the plaintiffs pleading on the ground that the statement of claim discloses no reasonable cause of action.

[2] The writ of summons and statement of claim were filed on 11 July 1996. The plaintiff's claim against the defendant is for unpaid professional fees.

[3] The unconditional appearance of the defendant was filed on 31 July 1996. The statement of defence was filed on 27 August 1996.

[4] The application to strike out the statement of claim under O 18 r 19 was filed on 11 September 2001.

[5] It is contended by the defendant/appellant that the plaintiff/respondent, cited in the title of the writ of summons and statement of claim as *'Akitek Bersatu'*, is not an entity that is, in law, capable of suing. The defendant argues that the so-called plaintiff, *'Akitek Bersatu'*, merely being a business name, does not have a legal personality; and an entity that does not have a legal personality cannot have a cause of action.

[6] I find that in the writ of summons and statement of claim, the exact nature of the personality of the plaintiff is unclear. The plaintiff is cited in the title of the writ of summons and the statement of claim merely as follows:

Akitek Bersatu .... Plaintif

And in the statement of claim, the plaintiff is merely described as:

1. Plaintif adalah Akitek Bertauliah yang menjalankan amalannya di No 91, Tingkat 1, Jalan 1/91, Taman Shamelin Perkasa, Cheras, 56100 Kuala Lumpur.

[7] The word 'Plaintiff' in paragraph 1 of the statement of claim must mean *'Akitek Bersatu'* because, as I have pointed out, in the title of the writ and statement of claim, the plaintiff is named as *'Akitek Bersatu'*. In my judgment, based on common sense and my knowledge of Malaysian culture, I am entitled to assume, and, indeed, I shall assume, that *'Akitek Bersatu'* is not the name of a natural person. Having made this assumption, I am tempted to assume further that *'Akitek Bersatu'* is the name of the business enterprise of the personality (i e the *real* plaintiff) behind the action. But the difficulty in my making such a further assumption is that it is not so stated in the statement of claim: the words *'Akitek Bersatu'* although they appear in the title of the statement of claim, never appear at all in the body of the statement of claim. Based on the premise that *'Akitek Bersatu'* is not a natural person, then the question arises: *who* or *what* is 'Akitek Bersatu'? Is it the business name of a sole proprietorship? Is it the business name of a partnership? Or, is it the name of company (or some form of body corporate)?

[8] The learned counsel for the plaintiff/respondent, in his written submission, having been made aware of the issue on legal personality by the defendant's written submission, could have – and indeed he has a legal duty to the Court to do so – clarified the meaning of *'Akitek Bersatu'* so that the defendant and the Court would have a clear picture of the legal personality of the plaintiff. Learned counsel should have been forthright. For example (depending on whatever the true position is), learned counsel could have asserted that the plaintiff is an individual suing under the name of his business? Or, that the plaintiff is a partner in a partnership and suing under the name of the partnership? Or, that the plaintiff is a company suing under the name of the company? Or even learned counsel could have been candid and admitted that there has been a mistake in the citing of the name of the plaintiff in the title of the writ and statement of claim; or a mistake (or an omission) in the description of the plaintiff in paragraph 1 of the statement of claim. But, alas, learned counsel for the plaintiff, in his written submission, took none of these courses of action suggested. Instead, in his written submission, he adamantly perpetuates the mystery by merely stating:

21. Responden berhujah bahawa Responden mempunyai rakan akitek bersekutu semasa tindakan ini difailkan.

[9] A statement such as this raises more questions than providing answers. For, what does the plaintiff mean by 'rakan akitek bersekutu'? Does he mean a partnership? But he could not have meant so because the Bahasa Malaysia term for 'partner' is 'rakan kongsi' and not 'rakan bersekutu'; and the Bahasa Malaysia term for partnership is 'perkongsian' (see Daftar Istilah Undang-Undang, Bahagian Penyelidikan dan Sekretariat, Bahasa Malaysia, Mahkamah Agung, Kuala Lumpur, 1990). Learned counsel could have easily used the words 'rakan kongsi' or 'perkongsian' if what he meant by paragraph 21 is that the plaintiff was a partner in a partnership.

[10] To reiterate what has been said, the citing of the plaintiff on the title of the writ and statement of claim, the description of the plaintiff in paragraph 1 of the statement of claim, and the submission on the point of legal personality in paragraph 21 of the plaintiffs written submission, all are unclear as to the true or precise legal personality of plaintiff. Be that as it may, on the hypothesis that the plaintiff is a natural person, then, why is he not suing under his own name? Why is he suing under the name of *'Akitek Bersatu'*? Is *'Akitek Bersatu'* the name of his business? This must be explained in the statement of claim. It is legally wrong for the plaintiff to expect the Court to guess or speculate *who 'Akitek Bersatu'* is or *what 'Akitek Bersatu'* means. The issue of the legal personality of the plaintiff (and also of the defendant) is fundamental and cannot be taken lightly. The plaintiff must be clear and candid in its/his pleading.

[11] On the hypothesis that he is a natural person, and assuming that *'Akitek Bersatu'* is the name of his business enterprise (despite the fact that there is no such claim to that effect in the statement of claim), as a matter of law the plaintiff can only *be sued* under the name of his business (see *Wee Thiang Kheng & Ors v Ngu Nii Soon & Ors* [1989] 1 MLJ 252). But he cannot *sue* under the name of his business. O 77 r 9 of the RHC states:

> 9. Application to person carrying on business in another name.
>
> An individual carrying on business within the jurisdiction in a name or style other than his own name may *be sued* in that name or style as if it were the name of a firm, and rules 2 to 8 shall, so far as applicable, apply as if he were a partner and the name in which he carries on business were the name of his firm. [Italics are mine.]

And O 77 r 1 of the RHC provides:

> 1. Actions by and against firms within jurisdiction.
>
> Subject to the provisions of any written law, any two or more persons claiming to be entitled, or alleged to be liable, as partners in respect of a cause of action and carrying on business within the jurisdiction may sue, or be sued, in the name of the firm (if any) of which they were partners at the time when the cause of action accrued.

[12] It will be observed that, unlike O 77 r 1, which deals with partnerships, and which has the words:

> ...may sue, or be sued....,

O 77 r 9, which deals with sole proprietorships, only states:

> ...may be sued....

Thus, only a partnership can sue in the name of the firm (see O 77 r 1 of the RHC). A sole proprietorship, could not.

[13] There is old case law authority which states that a sole proprietor cannot sue under the name of his firm. It is the case of *Mason and Son v Mogridge* (1892) 8 TLR 805. The law report reads as follows:

> This was an appeal from Mr. Justice Day, in Chambers, who gave judgment for the plaintiffs under Order 14, and overruled an objection which the defendant raised, that the plaintiff was suing in a firm name when he was the only member of it. The defendant appealed to the Court and referred to Order 48a, rules 1 and 11, which, though allowing him to be sued, did not allow him to sue.
>
> Mr Willes Chitty appeared for the defendant the appellant; Mr Newson for the plaintiff.
>
> The Court was of opinion that a single person cannot sue in a firm name, and that, as it was an Order 14 case, the rules must be complied with strictly, and therefore allowed the appeal, with costs.

[14] Next, is the plaintiff a partner in a partnership, and suing as such? In my view, it is not open to the plaintiff at this stage to argue that he is suing as a partner or as a partnership. For he has not pleaded as such (see paragraph 1 of the statement of claim). In any case, to repeat what has been said earlier, the written submission of learned counsel for the plaintiff is vague on this issue.

[15] Be that as it may, on the hypothesis that the plaintiff is suing as a partner in a partnership, then, again, by reason of O 77 r 9 read with O 77 r 1, he must still sue under his own name. Only if he is suing together with his partner (or partners) under the partnership can he sue under the name of the partnership firm.

[16] But I wish to reiterate here that the issue in the present case is not whether the plaintiff is suing as a sole proprietor or as a partner; or whether the plaintiff is suing under a business name. The issue here is more fundamental than that. The point that I would like to stress here is that, from the writ and the pleading (and also from the written submission of counsel), it is not clear at all what sort of an entity the plaintiff is. In law only a person who has a legal personality can sue. Hence, it is of paramount importance that the plaintiff states at the outset in no uncertain terms what his legal personality is. The plaintiff, whoever *he* is or *it* is, cannot indulge in vagueness.

[17] In my judgment, if the party suing does not make it clear in the writ and pleading that he/it has the legal personality to sue, then the Court is entitled to rule that he/it has no legal personality to sue and, as a consequence, no reasonable cause of action. For only an entity recognised by the law as having a legal personality to sue can have a cause of action.

[18] The plaintiff in opposing the defendant's application, submits that the defendant is now precluded from making the present application to strike out the statement of claim because it (ie, the defendant) had filed an unconditional appearance instead of a conditional appearance. The defendant cites the decision of the Supreme Court in *Alor Janggus Soon Seng Trading Sdn Bhd v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241. In this case cited, Jemuri Serjan CJ (Borneo) ruled (at p 478):

> It was open to the defendants to resort to O 18 r 19 or O 33 r 2 of our High Court Rules 1980 but they chose not to do so but to bring up the locus standi issue on their application to set aside the injunction. On this ground alone this appeal should succeed. It is too late now for the defendants to invoke O 18 r 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke O 18 r 19 but it is still open to them to have recourse to O 33 r 2 if they are so minded.

[19] In answer to this submission, I need only to refer to my judgment in *N Carrupaiya v MBf Property Services Sdn Bhd & Anor* [2000] 4 CLJ 116 where, in respect of a similar argument, I had ruled (at p 121):

> With respect, I must differ. In my judgment, the filing of an unconditional appearance does not preclude a defendant from making an application under O 18 r. 19. I find nothing in the RHC providing, either explicitly or impliedly, to that effect. On the contrary, O 18 r 19 expressly provides that such an application may be made at any stage of the proceeding. The words 'at any stage of the proceedings', to my mind, strongly imply that the right to make an application under O 18 r 19 is not conditional upon the filing of a conditional appearance. Such an application may be made, for example, after the filing of the statement of defence; or, even after the pleadings are deemed to be closed.

[20] At a later part of my judgment, I opined:

> I shall now revert to *Alor Janggus.* In the light of the authorities and the express provision of O 18 r 19 itself the remark of Jemuri Serjan CJ (Borneo) in that case to the effect:
>
> > It is too late now for the defendants to invoke O 18 r 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke O 18 r 19 but it is still open to them to have recourse to O 33 r 2 if they are so minded.
>
> is, to my humble mind and with the greatest respect, rather unsettling. For such a statement implies that an O 18 r 19 application can only be made if the defendant had previously filed a *conditional* appearance (as opposed to an *unconditional* appearance). In all humility, I find great difficulty in understanding this proposition. First and foremost, the learned Chief Justice (Borneo) did not explain why the Supreme Court held such a view – that the filing of an unconditional appearance precludes a defendant from making an O 18 r 19 application; nor were authorities cited to support the proposition. I find there is absolutely nothing either in the provision of O 18 r 19 or in the provisions of O 12 rr 6 and 7 (the provisions dealing with conditional appearance) that stipulates or implies that such an application cannot be made once an unconditional appearance has been filed. On the contrary, such a view as expounded by the Supreme Court appears to run counter to the express provision of O 18 r 19 which clearly stipulates that the application may be made at any stage of the proceedings.

[21] In the same judgment I had also ruled that that part of the judgment of Jemuri Serjan CJ (Borneo) that I had quoted was merely obiter dicta. I said (at p 124-125):

> In any case, as conceded by Encik Selva Balan for the plaintiff, the above brief remark by Jemuri Serjan CJ (Borneo) in *Alor Janggus* is merely an obiter dicta. For, in that case, whether or not the respondents could file an O 18 r 19 application, was not the issue before the Supreme Court. A mere obiter dicta of a higher court is not binding upon this court.

[22] In *N Carrupaiya* I had referred to and relied on the following cases:

(1) *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme and another action* [1987] 2 MLJ 633;

(2) *Jamir Hassan v Kong Min* [1992] 2 MLJ 46; and

(3) *Tengku Jaafar v KarpalSingh* [1993] 4 CLJ 183.

[23] In any case, the present case can be distinguished from the facts in *Alor Janggus*. In *Alor Janggus* the defendant did not dispute the legal personality of the plaintiff. What the defendant alleged in that case was that the plaintiff had no locus standi. In the present case, however, the complaint of the defendant is more fundamental. The defendant is not complaining that the plaintiff has no locus standi. The objection of the defendant is that the plaintiff has no legal personality to sue.

[24] On this issue of unconditional appearance, learned counsel for the plaintiff also relies on the decision of Abdul Malik Ishak J in *Pet Far Eastern (M) Sdn Bhd v Tay Young Huat* [1999] 2 CLJ 886. In this case cited the learned Judge said (at p 916):

> Finally, the issue raised by Mr. Clarence Edwin for the plaintiff in regard to the entry of an unconditional appearance must be considered by this Court. The second defendant had entered an unconditional appearance and had served on the plaintiff a statement of defence and by these actions the second defendant would, per se, be precluded from invoking the operation of O 18 r 19(1) of the RHC. I have in *Lim Seat Huat v Malayan United Realty Sdn Bhd* [1997] 5 CLJ 336 applied the decision of the Supreme Court in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Seng Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 ...

[25] In this regard, however, I must refer to *Chan Min Swee v Melawangi Sdn Bhd* [2000] 7 CLJ 1 where Abdul Malik Ishak J resiled from the earlier position that his lordship had taken in *Pet Far Eastern.* In this later case of *Chan Min Swee* the learned Judge, after setting out the provision of O 18 r 19(1), ruled that a defendant is not precluded from making an application under O 18 r 19 merely by reason of the fact that he had filed an unconditional appearance. In the words of the learned Judge (at p 39):

> I must emphasis the phrase 'at any sage of the proceedings' and it must necessarily mean that a party can make the application at any time up to the close of pleadings, and in special circumstances, even after the close of pleadings (see the speech of Zakaria Yatim J (as he then was) in *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman and Another Action* [1987] 2 MLJ 633 particularly at p 635 of the report). Now, since a party can generally make the application at any time up to the

close of pleadings stage, this must necessarily mean after filing an unconditional appearance or a conditional appearance which has become unconditional ...

[26] I also wish to refer to *Fu Yen Development Sdn Bhd v Shelly Yap Leong & Co* [2001] 3 CLJ 946 where Richard Malanjum J (as he then was), in dealing with a similar issue as well as the case *of Alor Janggus* had this to say (at p 950):

As for the contention that the respondent should not have applied under O 18 r 19 of the Rules since there was no conditional appearance entered, with respect I think the reply of learned counsel for the respondent answered it in that conditional appearance should only be entered if the objections were within any of the following, namely:

(i) the defective writ;

(ii) regularity of service of the writ; or

(iii) jurisdiction.

The main objection in this case did not fall within any of those categories.

[27] In conclusion, whoever is the plaintiff in the present action, by naming himself/itself as 'Akitek Bersatu' in the title of the writ and statement of claim, he/it has not satisfied the Court that he/it has a legal personality to sue. If he/it has no legal personality to sue, then it must follow that he/it has no reasonable cause of action.

[28] A defendant in an action is not precluded from making an O 18 r 19 application just because he has filed an unconditional appearance. In other words, the filing of a conditional appearance is not a prerequisite for the filing of an O 18 r 19 application.

[29] This appeal is allowed with costs. The statement of claim is struck out.

Appeal allowed with costs.

Reported by AG Kalidas